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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CENCO INCORPORATED,

Petitioner,

v.

SEIDMAN & SEIDMAN,

Respondent.

REPLY BRIEF OF SEIDMAN & SEIDMAN RESPONDING TO REPLY BRIEF OF CENCO INCORPORATED ON CENCO INCORPORATED'S PETITION FOR CERTIORARI

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Respondent Seidman & Seidman respectfully submits this reply brief in order to correct two significant factual misstatements in petitioner Cenco Incorporated's Reply Brief in Support of Petition.

1. The opening sentence in petitioner's reply brief states, "Respondent Seidman & Seidman does not dispute that the Petition presents important questions." (Pet. reply br. 1). Petitioner's statement is incorrect. Apparently, petitioner overlooked the footnote on the last page of respondent's Brief in Opposition to Petition for Certiorari, the penultimate sentence of which reads: "Thus, Cenco has not raised an important question, let alone an important question of federal law." (Resp. br. 26, n. 11). In addition to this explicit statement, a principal thrust of Seidman's brief in opposition to the petition was that the issue purportedly presented by the petition was solely one of Illinois law, involved extreme circumstances, was not intended to declare a universal principle of law and was merely episodic. (Resp. br. 10-12, 14, 26).

2. In attempting to refute the statement in respondent's Brief in Opposition to Petition that "[t]he federal common law issue raised in the petition had never been referred to, let alone argued, in the District Court," (Resp. br. 15), petitioner asserts in its reply brief:

> "The federal common law question was pleaded, argued, and directly addressed by the Court of Appeals.
>
> "The Seventh Circuit acknowledged that petitioner's cross-claims against respondent Seidman 'alleg[ed] that Seidman was liable to Cenco *under both federal and state common law* for having failed to prevent the fraud by Cenco's managers.' (App. A-3)." (Pet. reply br. 2). (emphasis petitioner's).

This quotation by petitioner from the Seventh Circuit's opinion is taken out of context. Even standing alone, the court's remark could be read to say either that Cenco's cross-claims were brought under *federal law* and state common law or that those cross-claims were brought under *federal common law* and state common law. However, read in context, the quotation does not say what Cenco contends; it does not say that Cenco's cross-claims of negligence, breach of contract and fraud were pleaded under federal common law. Indeed, they were not. Both before and after the excerpt from the opinion quoted by petitioner, the Seventh Circuit made it clear that petitioner's common law claims "were based solely on Illinois law." (Pet. App. A-4; see also, *e.g.*, Pet. App. A-1, A-5). The Seventh Circuit's reference to "federal ... law" was addressed to petitioner's claims, rejected by the Seventh Circuit, that certain jurisdictional statutes were the basis for federal jurisdiction even though no violation of a federal statute was alleged by petitioner. (See Pet. App. 4 and Resp. br. 1-2).

Clear evidence that petitioner's cross-claims for negligence, breach of contract and fraud were never pleaded or claimed in the District Court to be governed by federal common law is as follows:

a. The cross-claims, in five counts, comprising thirty-one pages, did not mention federal common law anywhere. Significantly, petitioner did not refer this Court to its pleading or attach the pleading to its reply brief herein, relying instead on an out-of-context excerpt from the Court of Appeals opinion, which if read Cenco's way, would be inconsistent with both the remainder of the Court of Appeals opinion and the pleading itself.[1]

b. Cenco did not even attempt to refute respondent's statement that Cenco did not argue federal common law in the District Court. Indeed, nothing in petitioner's cross-claims or in any argument by Cenco in the District Court would have put the District Judge or respondent on notice that Cenco was contending for the creation or applicability of federal common law. As respondent noted in its Brief in Opposition to Petition, and as the Court of Appeals recognized (Pet. App. A-4), the first time any mention of the alleged applicability of federal common law was made by Cenco was in its reply brief in the Court of Appeals.

c. The Court of Appeals, in affirming the District Court's directed verdicts in respondent's favor on Cenco's aiding and abetting and conspiracy claims, stated:

> "Like the rest of Cenco's cross-claim these counts are based solely on Illinois law." (Pet. App. A-4).

The Court of Appeals would not have stated that Cenco's

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[1] For the convenience of the Court, we have lodged with the Clerk of the Supreme Court a copy of Cenco's amended cross-claims against Seidman.

cross-claim was "based solely on Illinois law" if that Court had regarded Cenco's pleading in the District Court as having alleged that Seidman was liable to Cenco under federal common law.

Finally, Cenco's contention that the Court of Appeals "directly addressed" the federal common law issue (Pet. reply br. 2) involves considerable stretching of the word "addressed." What the Court of Appeals did, and properly so, was *decline to address* the merits of the federal common law claim, because federal common law was only "casual[ly]" referred to for the first time in Cenco's reply brief in the Court of Appeals. (Pet. App. A-4 and Resp. br. 15-16).

Respectfully submitted,

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